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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 DANIEL GONZALEZ, et al.,
11 Plaintiff(s),

Case No.: 2:18-cv-00979-APG-NJK

12 v.

ORDER

13 DIAMOND RESORTS INTERNATIONAL
14 MARKETING, INC., et al.,
15 Defendant(s).

16 Pending before the Court are the parties' supplemental briefs. Docket Nos. 69. 70. The
17 Court begins by noting what is not currently before it. On July 29, 2019, United States Magistrate
18 Judge Carl W. Hoffman issued an order, *inter alia*, conditionally certifying a collective action,
19 requiring notice to potential plaintiffs, and addressing various other aspects of the collective action
20 aspect of this case. Docket No. 52. Upon Judge Hoffman's retirement, the undersigned was
21 assigned to the case. Docket No. 55. As a general matter, judges newly assigned to a case do not
22 change course from the decisions that were entered previously. *See, e.g., Fairbank v. Wunderman*
23 *Cato Johnson*, 212 F.3d 528, 530 (9th Cir. 2000) (citing *Castner v. First Nat'l Bank of Anchorage*,
24 278 F.2d 376, 397 (9th Cir. 1960)). At this juncture, the only issues before the Court are whether
25 (1) the words "sales representatives" should be deleted from the amended proposed notice, (2) the
26 sentence "Defendants, and their owners, officers, directors, and management staff are not
27 permitted to discuss this case with you or to discuss whether you should or should not be included
28 in the lawsuit" should be deleted from the amended proposed notice, and (3) Defendants must

1 provide the personal email addresses for current employees. Accordingly, the undersigned's
2 evaluation of this matter is limited to these discrete topics, which are addressed in turn below.

3 **I. "SALES REPRESENTATIVE" TERMINOLOGY**

4 The parties first dispute whether the amended proposed notice properly provides a passing
5 reference to "sales representatives." Docket No. 69 at 5-6; Docket No. 70 at 5-6. Judge Hoffman
6 already addressed Defendants' concerns that the technical job title at issue in this case is "Vacation
7 Counselors," finding as follows:

8 Lastly, while plaintiffs refer to the job title for the putative class
9 members as "Sales Representatives," rather than the technical term
10 of "Vacation Counselors," the court still finds that plaintiff have
11 identified a tenable class because of the duties and responsibilities
12 associated with the position. However, given that plaintiffs concede
13 the technical term of the position, the court finds it necessary for
14 plaintiffs to modify the collective class definition to include
15 "Vacation Counselors." Plaintiffs are also ordered to modify their
16 proposed notice and consent form to include "Vacation
17 Counselors."

18 Docket No. 52 at 4. In light of Judge Hoffman's ruling, the amended proposed notice is addressed
19 to "All Current and Former Individuals [sic]¹ Who, at Any Time Since March 20, 2016, Held the
20 Position of Vacation Counselor, acting as sales representatives, at Diamond Resorts." Docket No.
21 70-1 at 2.

22 This sentence is plainly consistent with Judge Hoffman's previous order to include the job
23 title "Vacation Counselors." Moreover, the undersigned finds nothing objectionable about the
24 additional inclusion of "acting as sales representatives." Accordingly, Defendants' request to
25 change that language is **DENIED**.

26 ¹ The Court finds the wording of this sentence strange as a linguistic matter, as a person is
27 not generally referred to as either a "current individual" or a "former individual." Counsel may
28 want to consider altering the notice so that it is addressed to "current and former employees," a
change that the Court approves if counsel so agree. Cf. Docket No. 26 at ¶ 51 (answer admitting
that the collective action members were "employees" for purposes of the FLSA).

1 **II. SENTENCE REGARDING CONTACT BETWEEN OPT-IN PLAINTIFFS AND**
2 **DEFENDANTS**

3 The parties next dispute whether it is appropriate for the notice to include a sentence stating
4 that Defendants are not permitted to discuss the case with the potential opt-in plaintiffs. Docket
5 No. 69 at 6-7; Docket No. 70 at 6-7. Plaintiffs argue as a threshold matter that this issue was
6 already resolved by Judge Hoffman and that Defendants are attempting to get a second bite at the
7 apple in light of his retirement. Docket No. 70 at 6. Defendants argue that Judge Hoffman's order
8 did not expressly address this issue, such that it remains a live issue that should be addressed now.
9 *See* Docket No. 69 at 6 n.4. Plaintiffs have the better argument.

10 Defendants concede that they presented this very same argument to Judge Hoffman in the
11 motion practice on conditional certification. *Id.* Judge Hoffman addressed at length the various
12 arguments presented by the parties with respect to notice and ultimately concluded that: "Plaintiffs
13 are instructed to make all necessary changes *consistent with this order*, and to meet and confer
14 with defendants' counsel prior to resubmitting an amended proposed notice and consent form."
15 Docket No. 52 at 8 (emphasis added). Courts are not required to address every argument presented
16 by parties and unaddressed arguments are deemed rejected to the extent inconsistent with the
17 Court's ruling. *See, e.g., Gates v. Deukmejian*, 987 F.2d 1392, 1400 (9th Cir. 1992) ("we will
18 presume that the district court *implicitly* rejected those specific challenges to plaintiffs' billing
19 judgment deductions that it did not expressly discuss in its order" (emphasis in original)). In this
20 case, Judge Hoffman thoroughly addressed the proposed notice and identified the required changes
21 to it, changes that did not include omitting the sentence at issue in Defendants' argument. It seems
22 plain that in so doing Judge Hoffman was rejecting the argument that Defendants now attempt to
23 resurrect.

24 Defendants have not addressed the applicable standards for reconsideration of a
25 predecessor judge's rulings, let alone shown that they are met here.² The undersigned declines to
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27 ² Defendants are effectively hoping that the undersigned might disagree with the earlier
28 ruling, which is most assuredly not grounds to reconsider an earlier judge's ruling. *See, e.g., Stern*
v. Does, 2010 WL 11459792, at *4 (C.D. Cal. Apr. 29, 2010) (rejecting such a "dubious standard").

1 require that the disputed sentence be omitted from the notice. Accordingly, Defendants’ request
2 to omit this sentence is **DENIED**.

3 **III. PERSONAL EMAIL ADDRESSES**

4 The parties next dispute whether personal or company emails should be provided for
5 current employees. Docket No. 69 at 7-9; Docket No. 70 at 7-8. Judge Hoffman previously
6 ordered Defendants to “provide plaintiffs’ counsel with the . . . email address for putative class
7 members.” Docket No. 52 at 11. Defendants provided personal email addresses for former
8 employees who are potential opt-in plaintiffs, as well as for current employees who do not have a
9 work email address. Docket No. 69 at 7. For the balance of current employees who are potential
10 opt-in plaintiffs, however, Defendants have provided only their work email address and refused to
11 provide their personal email address. *See id.* Plaintiffs contend that privacy and privilege concerns
12 make it more prudent to utilize the personal email addresses of current employees given that work
13 emails can be monitored. Docket No. 70 at 7. Defendants counter that they must protect the
14 privacy interest employees have in their personal email addresses and worry that revelation of that
15 information could be used by Plaintiffs’ counsel for improper purposes. Docket No. 69 at 8-9.
16 Plaintiffs have the better argument.

17 The FLSA itself does not indicate the form of notice that the plaintiffs may use to reach
18 other potential collective action members. *See* 29 U.S.C. § 216(b). Moreover, the Supreme Court
19 has “confirm[ed] the existence of the trial court’s discretion [with respect to notice], not the details
20 of its exercise.” *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). Courts routinely
21 require the production of email addresses to ensure sufficient notice to potential opt-in plaintiffs.
22 *See, e.g., Lewis v. Wells Fargo & Co.*, 669 F. Supp. 2d 1124, 1128 (N.D. Cal. 2009). With respect
23 to which email address should be used (personal or work), neither party presents any legal authority
24 addressing that particular issue³ and the case law appears to be sparse.⁴

26 ³ The only case cited at all is a California Court of Appeal opinion that predates the advent
27 of modern computing. *See* Docket No. 69 at 8 (citing case from 1981).

28 ⁴ The case law is sparse presumably because this is an issue that should nearly always be
resolved by counsel through good faith meet-and-confer efforts.

1 Having balanced the parties' competing concerns, the Court finds the better approach is for
2 notice to be provided through the current employees' personal email addresses. While those
3 employees have a privacy interest in their email addresses, the intrusion by sending notice through
4 personal email is relatively minimal. *See In re Deloitte & Touche, LLP Overtime Litig.*, 2012 WL
5 340114, at *2 (S.D.N.Y. Jan. 17, 2012) ("the Court does not view the disclosure of [personal and
6 business] email addresses to class counsel as being unduly intrusive on the privacy and personal
7 interests of class members"); *see also Wade v. Furmanite Am., Inc.*, 2018 WL 2088011, at *7 (S.D.
8 Tex. May 4, 2018) ("The notion that providing email addresses of potential plaintiffs unnecessarily
9 invades those person's privacy interests is unavailing. Unlike social security numbers, email
10 addresses are freely exchanged and readily available to anyone who makes a concerted effort to
11 uncover such information"). Moreover, Plaintiffs have a significant interest in minimizing the risk
12 that Defendants could have access to communications that are protected by the attorney-client
13 privilege. *Cf. Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (explaining the importance
14 of the attorney-client privilege). Accordingly, the Court **GRANTS** Plaintiffs' request for personal
15 email addresses. Defendants must provide any personal email address it has for its current
16 employees by October 24, 2019.^{5,6}

17 IT IS SO ORDERED.

18 Dated: October 10, 2019

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Nancy J. Koppe
United States Magistrate Judge
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24 ⁵ Defendants represent that they do not have a personal email address for all current
25 employees. *See* Docket 69 at 3 n.1. For any current employee for whom Defendants do not have
a personal email address, Defendants must so certify by October 24, 2019.

26 ⁶ In conjunction with this issue, Defendants "renew" their request for a third-party
27 administrator to handle notice. Docket No. 69 at 9. No meaningful elaboration is provided. Judge
28 Hoffman already rejected this request, Docket No. 52 at 5, and the undersigned does not find
sufficient grounds to alter that ruling, *see Fairbank*, 212 F.3d at 530; *see also Stern*, 2010 WL
11459792, at *4.